



General Assembly

Distr.: General
2 July 2015

English only

Human Rights Council

Open-ended intergovernmental working group
on transnational corporations and other business
enterprises with respect to human rights
First session

Geneva, 6 – 10 July 2015

Written statement^{*} submitted by Center for International Environmental Law (CIEL), a non-governmental organization with special consultative status

The Secretary-General has received the following written statement which is circulated in
accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

^{*} This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.15-11134(E)



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I. Introduction

This report is prepared in anticipation of the first meeting of the Open-ended Intergovernmental Working Group (OEIWG) established by the Human Rights Council to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.¹

The human rights responsibilities of transnational corporations (TNCs) and other business enterprises, and how to uphold those responsibilities, continues to be a subject of significant debate in the international community. It is generally accepted under human rights law that States who are parties to multilateral human rights treaties have the obligation to protect human rights from threats that result from the conduct of other actors, such as TNCs, which operate within their territory. Rather than directly governing TNCs, who are not parties to such treaties, this approach places a burden on the host-State to effectively regulate TNCs and other business enterprises and provide redress for violations when they occur.

However, host-States may lack the institutional capacity and/or the political will to regulate or provide redress for human rights violations. In some cases host-States may even be complicit in human rights violations due to political interference, corruption, or pressure from powerful TNCs.² In other cases, international investment agreements (IIAs) may be in place which present obstacles to the State regulating TNCs effectively.³ Absent a sufficient regulatory scheme or redress mechanism in the host-State where the TNC carries out operations, it is exceedingly difficult to hold corporate actors responsible for human rights violations when they occur.

Noting the short-comings in the implementation of the host-State obligation to protect, this paper analyzes the extraterritorial duty to protect of home-States. This analysis is useful to elucidating how an internationally binding instrument can secure the implementation of extraterritorial obligations (ETOs) by home-States.

This paper begins by establishing the context of the problem in the current international legal order with respect to human rights and TNCs and describes the task of the Open-ended Intergovernmental Working Group on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Section Three provides a background on ETOs and an analysis of their current state of play in international law. Section Four presents an overview of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,⁴ and demonstrates how the Maastricht Principles may be used as the legal basis to articulate the scope and content of ETOs in an internationally binding instrument. Section Five addresses the implications of ETOs in respect to the activities of TNCs under international law and puts forth concrete recommendations. Section Six concludes.

¹ H.R.C. Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

² See Lillian Manzella & Nicholas Lusiani, Collective Report on Business and Human Rights: Submission to the 8th Session of the United Nations Human Rights Council 28-31 (ESCR-Net Corporate Accountability Working Group, June 2008), available at http://docs.escr-net.org/usr_doc/BHRCCollectiveReport_ESCR-Net.pdf; See also John Ruggie, Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, ¶ 27, U.N. Doc E/CN.4/2006/97 (Feb. 22, 2005) (describing the correlation between corrupt governance and corporate human rights abuses).

³ See Collective Report on Business and Human Rights, *supra* note 2 at 32.

⁴ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 29 NETH. Q. HUMAN RIGHTS 578 (2011), [hereinafter Maastricht Principles] available at <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm>.

II. Context

A. Toward a Treaty on Transnational Corporations and Human Rights

For many decades, the international community has strived to establish global standards with respect to business and human rights. In 1974, the U.N. Economic and Social Council established the Commission on Transnational Corporations to formulate an international corporate code of conduct for TNCs.⁵ The Commission struggled for nearly two decades to fashion an agreeable set of standards, but was ultimately obliged to dismantle in the 1990s due to a failure to come to a consensus.⁶

A second attempt at creating normative standards for corporate human rights obligations was made by the U.N. Subcommission on the Promotion and Protection of Human Rights in 2004 with the proposed 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.'⁷ The Draft Norms proposed a framework which would place binding obligations on corporations directly, whereby States would have 'primary' human rights duties, and businesses would have 'secondary' human rights duties.⁸ Businesses vehemently opposed the Draft Norms and the Commission on Human Rights eventually declined to adopt it.⁹

Instead, the Commission on Human Rights requested the U.N. Secretary General to appoint a Special Representative with the goal of clarifying the roles and responsibilities of States, businesses, and other social actors under international human rights law.¹⁰ In 2005, the U.N. Secretary General appointed a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG).¹¹ In 2008 the SRSG proposed the 'Protect, Respect, and Remedy Framework.'¹² This Framework includes (1) the state duty to protect against human rights abuses by third parties, including business, through policy, regulation, and adjudication; (2) the corporate responsibility to respect human rights, which means the responsibility to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and (3) greater access by victims to effective remedy, both judicial and non-judicial.¹³ This Framework was accepted by the Human Rights Council and was followed by a second mandate in 2008 to operationalize and promote it.¹⁴ The U.N. Guiding Principles on

⁵ See E.S.C. Res. 1913 (LVII) (Dec. 5, 1974).

⁶ For further discussion on the history of the United Nations' early work in business and human rights, see TAGI SAGAFI-NEJAD & JOHN H. DUNNING, *THE U.N. AND TRANSNATIONAL CORPORATIONS: FROM CODE OF CONDUCT TO GLOBAL COMPACT* (United Nations Intellectual History Project Series, 2008).

⁷ Subcomm'n on the Promotion and Protection of Human Rights, *Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

⁸ See *id.* ¶ 1.

⁹ See The U.N. "Protect, Respect and Remedy" Framework for Business and Human Rights, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (Sept. 2010), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>.

¹⁰ See Comm'n on Human Rights Res. 2005/69, U.N. Doc. E/CN.4/RES/2005/69 (April 20, 2005).

¹¹ U.N. Secretary General Kofi Annan appointed Harvard Professor John Ruggie in 2005 for a three-year appointment, and Secretary General Ban Ki-Moon continued the assignment for another three-year term in 2008.

¹² See John Ruggie, *Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Protect, Respect, and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

¹³ See *id.*

¹⁴ See H.R.C. Res. 8/7, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008).

Business and Human Rights,¹⁵ proposed by the SRSB and endorsed by the Human Rights Council in June 2011, were the result of this mandate. The Guiding Principles are a landmark in the development of a normative framework for business and human rights, yet the call remains for binding legal standards in this field.

In September 2013, at the 24th session of the U.N. Human Rights Council, a number of countries raised the need to adopt a treaty that would "clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States, and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute those companies."¹⁶ In June 2014, at the 26th session, the Council adopted resolution 26/9, creating an Open-ended Intergovernmental Working Group to produce a "legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."¹⁷

In light of this mandate, this paper analyzes the extraterritorial obligation to protect with a view to informing deliberations toward a legally binding instrument on TNCs and human rights. This paper submits that effective operationalization of the extraterritorial obligation to protect under human rights law is critical to closing existing gaps of protection with regard to corporate accountability for human rights abuses.

B. Imbalance in the International Legal Order

The current international legal order suffers from an imbalance that creates a gap in human rights protection as it relates to business activity. For one, businesses have rights but no obligations under international law. In addition, only host-States have international obligations with respect to their treatment of businesses, while most industrialized States, the home-States to those businesses, continue to fail in upholding their extraterritorial human rights obligations.¹⁸

This imbalance is aggravated by the operation of IIAs. Under IIAs investors are typically afforded rights and protections, without corresponding obligations related to their human rights impacts. On the other hand, while host-States retain their obligations to protect human rights under human rights instruments, standards of protection in IIAs such as those concerning indirect expropriation or the fair and equitable treatment standard post significant limitations to their ability to regulate in the public interest.

Stabilization clauses offer another example of ways in which IIAs may restrict a host-State's ability to regulate. Stabilization clauses are provisions in State contracts which limit the host-State's regulation of the investment project. Such clauses may require the host-State to exempt the investment from compliance with internal laws or indemnify the investment against costs incurred.¹⁹ Not only does this practice affect the host-State's ability to regulate for the

¹⁵ John Ruggie, Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Guiding Principles on Business and Human Rights: Implementing the Respect, Protect and Remedy Framework, U.N. Doc. A/HRC/17/31 (March 21, 2011) [hereinafter U.N. Guiding Principles].

¹⁶ Statement on Behalf of a Group of Countries at the 24th [sic.] Session of the Human Rights Council (September 2013), <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>.

¹⁷ H.R.C. Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

¹⁸ See Howard Mann, International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, International Institute for Sustainable Development, Feb. 2008, at 14-25, https://www.iisd.org/pdf/2008/iaa_business_human_rights.pdf; Stephanie Barbara Leinhardt, Some Thoughts on Foreign Investor's Responsibilities to Respect Human Rights: Aligning Human Rights and Investment Protection, 10 TRANSNATIONAL DISPUTE MANAGEMENT, no. 1, Jan. 2013, at 6-7.

¹⁹ Stabilization Clause, Practical Law Glossary Item 1-501-6477, Thompson Reuters (2015).

protection of human rights, but it can also put TNCs at a distinct advantage over domestic companies in the market who are obliged to comply.²⁰

The investor-state dispute settlement (ISDS) mechanism commonly included in IIAs similarly aggravates the imbalance apparent in the international legal order, since ISDS cannot be relied upon to uphold human rights and environmental protections, especially where these interests are not included in the language of the IIA.²¹ Typically, the paradigm emphasizing investors' rights and host-States' obligations prevails.

The imbalances brought about and aggravated by IIAs have been documented in recent years. As a result, varied attempts have been made by international economic organizations to bring balance to the situation by proposing the insertion of clauses into IIAs which recognize the responsibility of investors to respect human rights and the rights of host-States to regulate for the protection of human rights and the environment.²² The U.N. Conference on Trade and Development, in particular, has issued the 'Investment Policy Framework for Sustainable Development,' which advocates for the voluntary adoption of corporate social responsibility standards by TNCs, which would result in "turning voluntary standards into mandatory requirements."²³

These attempts have made some headway in balancing the rights and obligations of investors and host-States. However, the limitations are systemic and serious, and they call for structural solutions: ETOs provide such a structural solution. Implementing the home-States' obligations to protect human rights bridges the gaps in human rights protection by rebalancing the legal rights and obligations of host- and home-States with respect to human rights.

C. International State of Play Regarding Extra-Territorial Obligations: The Necessity of Disaggregating the Sources

The Extraterritorial Obligation to Protect

The obligations of States with respect to human rights are three-fold. First, States have an obligation to respect human rights by not interfering with or curtailing the enjoyment of human rights.²⁴ Second, States have an obligation to protect

²⁰ See *id.*

²¹ See Mann, *supra* note 18, at 25-29; see, e.g., Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010) (weighing the rights of investors against the human rights of the population at large).

²² See, e.g., Southern African Development Community, Protocol on Financing and Investment, Annex I, Art. 10 (Aug. 18, 2006), http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf ("Foreign investors shall abide by the laws, regulations, administrative guidelines of the Host State."); Common Market for Eastern and Southern Africa (COMESA), Investment Agreement for the COMESA Common Investment Area, Art. 32, http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf ("This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under existing agreements to which they are parties."). See also, Howard Mann, Konrad Von Moltke, Luke Eric Peterson & Aaron Cosbey, IISD Model International Agreement on Investment for Sustainable Development: Negotiator's Handbook, Art. 25 (International Institute for Sustainable Development, 2nd ed., April 2006), https://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf (providing for the "balance of rights and obligations of investors and investments and host states").

²³ U.N. Conference on Trade and Development, Investment Policy Framework for Sustainable Development, 14, (2012), [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx).

²⁴ See Office of the High Commissioner for Human Rights, International Human Rights Law, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

individuals and groups against human rights abuses by third parties.²⁵ Third, States have an obligation to fulfil human rights by taking positive action to facilitate the enjoyment of basic human rights.²⁶

It is generally accepted that a State's obligations to protect, respect, and fulfil human rights extend to those individuals and entities situated within the territory of the State. But do these obligations extend to people situated outside the State's territory? And if so, under what circumstances? And what conduct do these obligations require from States?

In regard to these questions, certain human rights instruments require States parties to exercise these obligations with respect to the rights of all persons subject to or within their 'jurisdiction.'²⁷ Other human rights instruments do not contemplate jurisdictional limitations.

It is becoming increasingly recognized in the opinions of international tribunals, human rights treaty bodies, and U.N. special mandates holders, that the 'jurisdiction' of the State, and thereby the spatial scope of its human rights obligations, indeed extends beyond the State's territory in certain circumstances. On that basis, ETOs have been defined generally in human rights law as "the human rights obligations of Governments toward people living outside of its own territory."²⁸

This section analyzes current state of play of ETOs with regard to corporate actors and human rights.

The U.N. Guiding Principles on Business and Human Rights

As noted above, the U.N. Secretary General appointed a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) in 2005. The SRSG's mandate was renewed in 2008 with the instruction "to provide views and concrete recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights abuses by or involving transnational corporations and other business enterprises."²⁹

In 2011, the SRSG published, and the Human Rights Council endorsed, the Guiding Principles on Business and Human Rights,³⁰ which aimed at the creation of global human rights standards for businesses. The Guiding Principles make

²⁵ See *id.*

²⁶ See *id.*

²⁷ Hugh King, *The Extraterritorial Obligations of States*, 9 HUMAN RIGHTS L. REV., no. 4, at 521 (2009). See, e.g., American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 123 ("The States Parties to this Convention undertake to...ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"); International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"); Convention on the Rights of the Child art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.").

²⁸ Jean Ziegler, Report of the Special Rapporteur on the Right to Food, ¶ 35, U.N. Doc. E/CN.4/2005/47 (Jan. 24, 2005).

²⁹ H.R.C. Res. 8/7, ¶ 4, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008).

³⁰ U.N. Guiding Principles, *supra* note 15.

clear that States are the sole bearers of legal human rights obligations, while at the same time corporations bear a 'responsibility to respect' human rights.³¹ The introduction to the Guiding Principles clearly states that, "nothing in these Guiding Principles shall be read as creating new international law obligations."³²

With regard to ETOs the Guiding Principles concluded: "At present, states are not generally required under international human rights law to regulate the extra-territorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a jurisdictional basis."³³ The Guiding Principles do not assert any ETOs, but provide that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."³⁴

With regard to extraterritorial jurisdiction, the SRSR noted in a 2010 Report that in several policy domains, such as anti-corruption, anti-trust, securities regulation, environmental protection, and general civil and criminal jurisdiction, States have agreed to certain uses of extraterritorial jurisdiction. However, he found that "this is typically not the case in business and human rights."³⁵

The SRSR's conclusions regarding the ETO to protect human rights from corporate abuse, were drawn from "an extensive programme of systematic research" on "evolving patterns of international human rights law and criminal law; emerging practices by States and companies; commentaries of United Nations treaty bodies on obligations concerning business-related human rights abuses; the impact of investment agreements and corporate law and securities regulation on both States' and enterprises' human rights policies; and related subjects."³⁶ However, these conclusions fail to reflect the variation and nuance in international human rights law regarding State extraterritorial obligations, in particular the language of human rights instruments and conclusions drawn by treaty bodies, Special Procedures, and international tribunals.³⁷ This jurisprudence is considered below.

International Jurisprudence Regarding Home-State Responsibility

The principle that States should exercise due diligence in protecting individuals from human rights violations resulting from the conduct of third parties is well established in human rights jurisprudence. For instance, the Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras* in 1988 held: "An illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."³⁸ International tribunals have found that this due diligence obligation also extends extraterritorially, depending on the relationship of the State to the individuals or entities acting abroad. For instance, under customary international law, States are generally responsible for the conduct of non-State actors if those actors are acting as de facto agents of the State.³⁹ International jurisprudence has evolved to reveal further variations on the State-to-actor relationship which trigger State responsibilities.

³¹ See *id.*, intro. ¶ 6.

³² *Id.*, at 6.

³³ *Id.*, ¶ 2 cmt.

³⁴ *Id.*, ¶ 2.

³⁵ John Ruggie, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 46, U.N. Doc A/HRC/14/27 (April 9, 2010).

³⁶ U.N. Guiding Principles, *supra* note 15, intro. ¶ 4.

³⁷ John Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in *THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* 79 (Radu Mares ed., 2012).

³⁸ *Velásquez Rodríguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

³⁹ See *Responsibility of States for Internationally Wrongful Acts*, Rep. of the Int'l Law Comm'n, 53rd Sess., ch. II, U.N. Doc A/56/10, GOAR 56th Sess., Supp. No. 10 (2001).

An 'effective control' standard was first laid out by the International Court of Justice (ICJ) in 1986 in The Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America).⁴⁰ In determining whether the United States could be held responsible for the actions of contra forces in Nicaragua, the ICJ held that the United States could be found responsible for these actions if it were "proved that the State had an effective control of the operations in the course of which the alleged violations were committed."⁴¹

The Court sought to determine whether the relationship of the contras to the United States Government was "such that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government."⁴² Although finding that the United States had largely financed, trained, equipped, armed, and organized the contra forces, the Court was not satisfied that "all the operations launched by the contra force [sic.], at every stage of the conflict, reflected strategy and tactics solely devised by the United States," and ultimately found that there was "no clear evidence that the United States actually exercised such a degree of control as to justify treating the contras as acting on its behalf."⁴³

While the Nicaragua case sets a high standard for the invocation of State responsibility with respect to ETOs, it nonetheless acknowledges that ETOs exist in certain cases involving the actions of private actors. Moreover, it provides an important standard that may be applied in certain fact-specific instances involving extraterritorial human rights abuses by TNCs.

More recently, courts have developed the standard of 'decisive influence.' This standard was applied by the European Court of Human Rights (ECtHR) in 2004 in *Ilascu and Others v. Moldova and Russia*.⁴⁴ In determining whether Russia was responsible for harm caused to the applicants by authorities in the self-proclaimed, unrecognized Moldovan Republic of Transnistria, the ECtHR found that because Transnistria was "set up . . . with the support of the Russian Federation, vested with organs of power and its own administration," and survived only "by virtue of the military, economic, financial, and political support given to it by the Russian Federation," it "remain[ed] under the effective authority, or at the very least under the decisive influence, of the Russian Federation."⁴⁵ Russia therefore had, "a continuous and uninterrupted link of responsibility for the applicants' fate" and it was "of little consequence that . . . agents of the Russian Federation ha[d] not participated directly in the events complained of in the present application."⁴⁶

This 'decisive influence' standard was also applied by the ICJ in the 2007 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),⁴⁷ where the Court considered the responsibility of the former Federal Republic of Yugoslavia (FRY) for acts of genocide committed by Bosnian Serbs against Bosnian Muslims in Srebrenica. The ICJ found that under the Genocide Convention, the FRY was required to ensure that "any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide [.]"⁴⁸ The ICJ elaborated that the use of the term 'influence' reveals a responsibility by the State for the conduct of "not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the [FRY] maintained close links and on which it could exert a

⁴⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 181 (June 27).

⁴¹ *Id.*, ¶ VII.5.

⁴² *Id.*, ¶ VII.4.

⁴³ *Id.*

⁴⁴ *Ilascu & Others v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179 (July 8).

⁴⁵ *Id.* at ¶ 392.

⁴⁶ *Id.* at ¶ 393.

⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43 (Feb. 26).

⁴⁸ *Id.* ¶ 435 (citing 1993 I.C.J. 24, ¶ 52(A)(2)).

certain influence.”⁴⁹ In this case, the ICJ concluded that the FRY had a due diligence obligation with regard to the actions of Bosnian Serbs, stating “In view of their undeniable influence . . . the Yugoslav authorities should . . . have made the best efforts within their power to try and prevent the tragic events then taking shape.”⁵⁰

This recent case law suggests that home-States may readily have a due diligence obligation vis-à-vis their TNCs under the ‘decisive influence’ standard. This standard, as laid out in *Ilseacu and Bosnia*, is generally reflected in the relationship that home-States have with their TNCs. Home-States often provide financial, political, and other forms of support for TNC activities in other countries. This support may be in the form of negotiation and ratification of IIAs, financing or other services by export credit agencies,⁵¹ diplomatic efforts, or political influence in international financial institutions.⁵² More importantly, home-States enable TNCs’ legal existence and exert control and influence over TNCs through their own domestic corporate law. Home-States also negotiate international investment treaties which define and influence the international legal framework in which TNCs are able to operate.⁵³ In light of these factors, home-States arguably exert significant control and ‘decisive influence’ over their corporate nationals.

This brief analysis of international case law concerning State responsibility for the extraterritorial activities of non-State actors indicates that States do, in fact, have an extraterritorial obligation to protect human rights, through the exercise of due diligence, at least with regard to non-State actors over which they have a certain degree of influence or control. Although the case law to date has addressed ETOs primarily in cases involving armed conflict and extraterritorial occupation,⁵⁴ the reasoning underlying the case law provides a legal basis for how these standards may be applied to TNCs.

Analysis of Recent Reports of U.N. Treaty Bodies

Statements by U.N. treaty bodies demonstrate wide support for ETOs with respect to TNCs. While certain U.N. treaty bodies strongly encourage States to regulate the activities of their corporate nationals operating extraterritorially,⁵⁵ other treaty bodies have actually indicated a State obligation to do so.

⁴⁹ *Id.* ¶ 435.

⁵⁰ *Id.* ¶ 438.

⁵¹ For example, some government export agencies offer overseas investment insurance to cover the political and commercial risks borne by TNCs operating abroad. See Bonnie Penfold, Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities 10-14 (International Labour Office, Working Paper No. 95, 2005), available at http://www.ilo.ch/wcmsp5/groups/public/@ed_emp/@emp_ent/@multi/documents/publication/wcms_101040.pdf.

⁵² See Smita Narula, International Financial Institutions, Transnational Corporations, and Duties of States 143 in M. LANGFORD, ET. AL., GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (2014).

⁵³ See Robert McCorquodale & Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law (2007), 70 MODERN L. REV., no. 4 at 599 (2007) (demonstrating how States may facilitate or otherwise contribute to situations involving TNC violations through their support and assistance to corporate nationals in global trade and investment ventures).

⁵⁴ See, e.g., *Nicaragua*, 1986 I.C.J. 14 (considering U.S. responsibility for the acts of armed contra forces in Nicaragua); see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, (June 21) (holding that “Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.”).

⁵⁵ See, e.g., Committee on the Elimination of Racial Discrimination [CERD], Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention, Concluding Observations of the Committee: Australia, ¶ 13, U.N. Doc. CERD/C/AUS/CO/15-17 (Aug. 27, 2010) (“[T]he Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of Australian

The Committee on the Rights of the Child (CRC) produced a General Comment focused specifically on business and human rights.⁵⁶ Building on the Maastricht Principles,⁵⁷ the CRC has explicitly stated that “home States also have obligations . . . in the context of businesses’ extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned.”⁵⁸ According to the CRC, said ‘reasonable link’ exists where “a business enterprise has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned.”⁵⁹ This statement casts a wide net of extraterritorial obligation for States Parties to the Convention on the Rights of the Child and its related instruments,⁶⁰ as it obliges each State party to regulate not only its own corporate nationals, but also those corporations who carry out substantial business activities in it.

The Committee for Economic, Social and Cultural Rights (CESCR) has reiterated the obligation of States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) “to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities.”⁶¹ This statement, using obligatory language, has been made without reference to any territorial limitations. In fact, elaborating on this obligation, the CESCR has stated that “States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.”⁶² The CESCR’s emphasis on the extraterritorial dimension of economic, social, and cultural rights obligations is reflected in the Committee’s General Comments on the rights to Food, Water and Sanitation, Health, and Social Security. For instance, General Comment No. 19 on the Right to Social Security directly states: “States Parties should extraterritorially protect the right to social security by preventing their own citizens and nationals from violating this right in other countries.”⁶³ General Comment No. 15 on the Right to Water states: “Steps should be taken by States Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.”⁶⁴ General Comment No. 12 on the Right to Adequate Food states: “[A]s part of their obligations to protect people’s resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.”⁶⁵

While each of these uses the language of ‘should,’ each of these statements is made in elaboration on the content of obligations of States parties under the Covenant, supporting the Committee’s conclusion that each of these economic, social and cultural rights obligations has an extraterritorial reach.

corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad.”).

⁵⁶ See Comm. On Rights of the Child [CRC], General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights, U.N. Doc. CRC/C/GC/16 (April 17, 2013).

⁵⁷ See Maastricht Principles, *supra* note 4; *infra* ch. 0.

⁵⁸ CRC, General Comment No. 16, *supra* note 56, ¶ 43.

⁵⁹ *Id.*

⁶⁰ *Id.*, ¶ 8.

⁶¹ UN Committee on Economic, Social and Cultural Rights [CESCR], Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social, and Cultural Rights, ¶ 1, U.N. Doc. E/C.12/2011/1 (July 12, 2011).

⁶² *Id.*, ¶ 5.

⁶³ CESCR, General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant), ¶ 54, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008).

⁶⁴ CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), ¶ 33, E/C.12/2002/11 (Jan. 20, 2003).

⁶⁵ CESCR, General Comment No. 12: The Right to Adequate Food, ¶ 27, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

In addition to these two treaty bodies which have made clear the extraterritorial application of Covenant obligations, other treaty bodies, while not using obligatory language, do regularly encourage States to regulate the extraterritorial activities of TNCs for the protection human rights. For instance, in its Consideration of Reports submitted by States parties, the Committee on the Elimination of Racial Discrimination (CERD) expressed concern that Canada "has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside Canada."⁶⁶ The CERD also encouraged Australia to "regulate the extraterritorial activities of Australian Corporations abroad."⁶⁷ While the language employed may appear hortatory, the repeated call by treaty bodies for extraterritorial regulation of TNC activities demonstrates strong support for the implementation of ETOs.

An analysis of the opinions of treaty bodies with regard to ETOs also reveals legal standards applied to determine when extraterritorial regulation is warranted. As in the case law examined above, treaty bodies have encouraged States to regulate extraterritorially in situations where the State exercises 'decisive influence' or 'effective control'. The Human Rights Committee has stated that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."⁶⁸ The Committee Against Torture (CAT) has similarly stated that States should regulate "in all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law."⁶⁹ With regard to decisive influence, the CESCR wrote in General Comment No. 15, "where States parties can take steps to influence other third parties to respect the right [to water], through legal or political means, such steps should be taken."⁷⁰

As observed previously, the Committee on the Rights of the Child has also developed the 'reasonable link' standard, stating that home-States have an obligation to regulate TNCs "provided that there is a reasonable link between the State and the conduct concerned."⁷¹ The CRC has also repeatedly called for regulation on the basis of nationality, calling for companies to regulate the activities of corporations with their nationality operating abroad.⁷²

Thus, the analysis of the work of U.N. human rights treaty bodies indicates wide support for ETOs.

⁶⁶ CERD, Reports submitted by States parties under Art. 9 of the Convention: International Convention on the Elimination of All Forms of Racial discrimination: addendum: Information provided by the Government of Canada on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, ¶ 4, U.N. Doc. CERD/C/CAN/CO/19-20 (Apr. 4, 2012).

⁶⁷ CERD, *supra* note 56, ¶ 13.

⁶⁸ Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (emphasis added).

⁶⁹ Committee Against Torture [CAT], General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 16, CAT/C/GC/2 (Nov. 23, 2007).

⁷⁰ CESCR, General Comment No. 15, *supra* note 64.

⁷¹ CRC, *supra* note 56, ¶ 43.

⁷² See CRC, Consideration of Reports submitted by States Parties Under Art. 44 of the Convention, Concluding Observations: Azerbaijan, ¶ 29, U.N. Doc. CRC/C/AZE/CO/3-4 (March 12, 2012); CRC, Consideration of Reports Submitted by States Parties Under Art. 44 of the Convention: Concluding Observations: Bahrain, ¶ 21, U.N. Doc. CRC/C/BHR/CO/2-3 (Aug. 3, 2011); CRC, Consideration of Reports Submitted by States Parties Under Art. 44 of the Convention: Concluding Observations: Thailand, ¶ 30, U.N. Doc. CRC/C/THA/CO/3-4 (Sept. 14, 2011); CRC, Consideration of Reports Submitted by States Parties Under Art. 44 of the Convention: Concluding Observations: Turkey, ¶ 23(b), U.N. Doc. CRC/C/TUR/CO/2-3 (July 20, 2012).

Analysis of Recent Reports of Special Procedures of the Human Rights Council

The Special Procedures of the Human Rights Council, which have the mandate of reporting and advising on human rights from a thematic or country-specific perspective, have likewise expressed support for the application of ETOs.

The Special Rapporteurs on the Right to Food, in particular, have made explicit statements acknowledging the obligatory nature of ETOs. In 2006 the Special Rapporteur acknowledged that "The extraterritorial obligation to protect the right to food requires States to ensure that third parties subject to their jurisdiction (such as their own citizens or transnational corporations), do not violate the right to food of people living in other countries."⁷³ In 2008, the Special Rapporteur laid out the obligation that States "ensure that their international policies of a political and economic nature . . . do not have negative effects on the right to food in other countries."⁷⁴ In 2013, the Special Rapporteur explicitly stated that "the duties associated with the right to food extend to all situations, whether located on a State's national territory or abroad, over which a State may exercise influence without infringing on the sovereignty of the territorial State."⁷⁵

Other mandate holders have recognized ETOs as integral to the obligation of international cooperation as laid out in Articles 55 and 56 of the U.N. Charter.⁷⁶ The Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment has stated: "Although work remains to be done to clarify the content of extraterritorial human rights obligations pertaining to the environment, the lack of complete clarity should not obscure a basic point: States have an obligation of international cooperation with respect to human rights."⁷⁷ The Special Rapporteur on Extreme Poverty and Human Rights stated in a 2014 report: "As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights everywhere, which involves avoiding conduct that would foreseeably risk impairing the enjoyment of human rights by persons beyond their borders, and conducting assessments of the extraterritorial impact of laws, policies and practices."⁷⁸

The importance of ETOs in human rights protection is reflected in the work of many other Special Procedures mandates. For instance, the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises has suggested that States "explore the application of extraterritorial jurisdiction in situations where victims

⁷³ Jean Ziegler, Rep. of the Special Rapporteur on the Right to Food, ¶ 36, U.N. Doc. E/CN.4/2006/44 (March 16, 2006).

⁷⁴ Olivier De Schutter, The Right to Food: Interim Rep. of the Special Rapporteur on the Right to Food to the General Assembly, transmitted by Note of the Secretary General, ¶11, U.N. Doc. A/63/278 (Oct. 21, 2008).

⁷⁵ Olivier De Schutter, Right to Food: Interim Rep. of the Special Rapporteur on the Right to Food, ¶ 9, U.N. Doc. A/68/288 (Aug. 7, 2013). The Special Rapporteur has also addressed ETOs in the context of forced evictions due to the production of agro-fuels abroad, and stated that such evictions, "constitute clear violations of the obligations to respect and protect people's existing access to food." Jean Ziegler, Preliminary Report to the Drafting Group of the H.R.C. Advisory Committee on the Right to Food, ¶ 27, U.N. Doc. A/HRC/AC/2/CRP.2 (Jan. 19, 2009). In the same report, the Special Rapporteur called for States to be mindful of their extraterritorial obligations toward the realization of the right to food in subsidizing the industrial fishing sector. *Id.* ¶ 63(a).

⁷⁶ "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." U.N. Charter art. 56.

⁷⁷ John Knox, Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment [Mapping Report], ¶ 67, U.N. Doc. A/HRC/25/53 (30 Dec. 2013).

⁷⁸ Magdalena Sepúlveda Carmona, Rep. of the Special Rapporteur on Extreme Poverty and Human Rights, ¶ 30, U.N. Doc. A/HRC/26/28 (May 22, 2014). Specifically, the Special Rapporteur has applied the ETO to tax evasion, stating that States should take "concerted and coordinated measures against tax evasion globally as part of their domestic and extraterritorial human rights obligations and their duty to protect people from human rights violations by third parties, including business enterprises." *Id.* ¶ 62.

face denial of justice in the country where the alleged abuse occurred,” and “address legal barriers, such as the legal liability of parent companies for the involvement of a subsidiary in a human rights abuse.”⁷⁹ The Special Rapporteur on the Right to Adequate Housing has said that concerns about the effects that TNCs may have on the right to housing “has led to important work to assess and clarify issues of corporate accountability, extraterritorial obligations and human rights in relation to trade and investment agreements.”⁸⁰

An analysis of the Special Procedures’ work demonstrates a collective understanding as to the integral nature of ETOs to human rights and environmental protection where TNCs operate.

International State of Play Regarding Extraterritorial Obligations

Ultimately, disaggregating the sources and thoroughly analyzing the work of international tribunals, U.N. treaty bodies, and Special Procedures indicates that the international community’s position on the legal nature of the ETO is more complex than, as the SRSG put it in the Guiding Principles, “not generally required, but not generally prohibited.”⁸¹ Not only do many of these bodies strongly support and encourage extraterritorial regulation, but many, in fact, do recognize ETOs in certain cases.

In 2011, a group of international legal experts developed the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,⁸² aimed at clarifying ETOs and providing guidance and a legal basis for its effective implementation. Although the principles address ETOs with respect to economic, social and cultural rights, this focus does not exclude their applicability to all human rights.⁸³ As such, the Maastricht Principles provide a useful model for the development of a legally binding instrument to effectively regulate, in international human rights law, the activities of transnational corporations and other business enterprises by clarifying and delineating the content and application of ETOs.

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights

Aim and Legal Value of the Maastricht Principles

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights were adopted in September 2011 by a group of experts in international law and human rights convened by Maastricht University and the International Commission of Jurists.⁸⁴ These experts came from universities and organizations located in all regions of the world, and included current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the U.N. Human Rights Council.⁸⁵

⁷⁹ Rep. of the Working Group on Human Rights and Transnational Corporations, ¶ 70, U.N. Doc. A/69/263 (Aug. 5, 2014).

⁸⁰ Leilani Farha, Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, ¶¶ 52, 85, U.N. Doc. A/69/274 (Aug. 7, 2014).

⁸¹ See Guiding Principles, *supra* note 15, ¶ 2 cmt.

⁸² See Maastricht Principles *supra* note 4.

⁸³ See *id.*, ¶ 5.

⁸⁴ See Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, & Ian Seiderman, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 34 HUMAN RIGHTS Q. 1084, 1084 (2012).

⁸⁵ See *id.*

A Commentary to the Maastricht Principles was later written by members of the drafting group who facilitated the elaboration of the Principles.⁸⁶

The meeting and its resulting instrument were aimed at clarifying the content of extraterritorial State obligations with a view to advancing and giving full effect to the Charter of the United Nations and international human rights law, particularly in the context of economic globalization.⁸⁷ The meeting was concerned with the lack of accountability and regulation for TNCs, intergovernmental organizations, and international financial institutions as well as the lack of human rights considerations in international investment and trade laws, policies, and disputes.

The Maastricht Principles are premised on the global and universal nature of human rights and the notion that human rights are owed *erga omnes* to the international community as a whole.⁸⁸ However, the Principles do not create new legal norms. Rather, they articulate the current state of international law regarding ETOs, reflecting many of the conclusions drawn by international tribunals, U.N. treaty bodies, and Special Procedures.⁸⁹ In particular, the Maastricht Principles provide a basis for conceptualizing the application and implementation of ETOs in order to secure more effective protection of human rights from third-party violations.

Structure and Content of the Maastricht Principles

The Maastricht Principles are divided into seven sections. The first section sets out the General Principles of human rights and States' obligations with respect to human rights. The second section defines the scope of extraterritorial obligations of States. The third, fourth, and fifth sections address the extraterritorial dimensions of the obligations to respect, protect, and fulfil human rights respectively. The sixth section addresses the obligation of a State to ensure the availability of effective remedies and accountability mechanisms. The seventh section sets out the final provisions relating to the limitations of ETOs, and emphasizes that the Principles should not be invoked by States in order to limit their territorial obligations.

Definition and Scope of the Extraterritorial Obligations of States

Principle 8 defines two types of obligations as extraterritorial. The first are obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory.⁹⁰ The second are obligations of a global character, set out in the Charter of the United Nations and in human rights instruments, to take action separately and jointly through international cooperation, to realize human rights universally.⁹¹

Principle 9 provides that these ETOs are triggered in three jurisdictional situations. First, the State has extraterritorial obligations in situations over which the State exercises authority or effective control, whether or not such control is exercised in accordance with international law.⁹² This 'effective control' standard is consistent with that expressed in the international jurisprudence and treaty body opinions discussed above.⁹³ As noted, this standard may be applicable to TNCs in certain situations where States exercise a certain amount of authority or control over their corporate nationals.⁹⁴

⁸⁶ *Id.*

⁸⁷ See Maastricht Principles, *supra* note 4, pmbi. ¶8

⁸⁸ See De Schutter, et. al., *supra* note 84, at 1103, 1142, 1166.

⁸⁹ See *infra*, ch. 3.

⁹⁰ Maastricht Principles, *supra* note 4, ¶ 8(a).

⁹¹ *Id.*, ¶ 8(b).

⁹² *Id.*, ¶ 9(a).

⁹³ See *infra* sections 3.3-3.4.

⁹⁴ See *infra* section 0.

Second, the State has extraterritorial obligations in situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social, and cultural rights, whether within or outside its territory.⁹⁵ The obligation of a State in this situation would arise where State authorities knew or should have known that the presence or conduct of TNCs in a particular location would bring about substantial human rights abuses in another country.⁹⁶

Third, the State has extraterritorial obligations in situations in which the State, acting separately or jointly, whether through its executive, legislative, or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.⁹⁷ This 'decisive influence standard' reflects the case-law analyzed above and is further consistent with the recommendations made by various U.N. treaty bodies and Special Procedures which recommend or encourage states to take steps to influence third parties through legal or political means.⁹⁸

In order to address the need for mechanisms that guarantee the effective implementation of ETOs, Principles 36-38 articulate the obligations of States to provide for accountability mechanisms, including full and thorough monitoring of compliance with human rights obligations, and prompt, accessible, and effective remedies, which lead to thorough and impartial investigation, cessation of the violation, and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.⁹⁹

Taking into account State sovereignty concerns in the exercise of extraterritorial jurisdiction, Principle 10 sets out limitations on the scope of extraterritorial jurisdiction, providing that a State's obligation to respect, protect, and fulfil does not authorize a State to act in violation of the U.N. Charter and general international law.¹⁰⁰ This means that the exercise of extraterritorial jurisdiction by a State does not justify intervention in the domestic affairs of the territorial state, interference with its sovereign rights, or hampering the principle of equality of all States.¹⁰¹

Content of the Extraterritorial Obligation to Protect

Sections III, IV, and V of the Principles lay out the substantive content of the obligations to respect, protect, and fulfil economic, social, and cultural rights extraterritorially. Section IV (Principles 23-27), in particular, addresses the substantive content of the extraterritorial obligations to protect.

Principle 23 reiterates the general obligation that "All States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially[.]"¹⁰²

Principle 24 sets forth the obligation to regulate, providing that "All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, . . . such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social,

⁹⁵ Maastricht Principles, *supra* note 4, ¶ 9(b).

⁹⁶ See Commentary to the Maastricht Principles, *supra* note 84, at 1136.

⁹⁷ Maastricht Principles, *supra* note 4, ¶ 9(c).

⁹⁸ See *infra* section 3.4-3.5.

⁹⁹ See Maastricht Principles, *supra* note 4, ¶ 36-38.

¹⁰⁰ *Id.* ¶ 10.

¹⁰¹ See Commentary to the Maastricht Principles, *supra* note 84, at 1141-42. The ICJ in *Nicaragua*, 1986 I.C.J. 14, ¶ 205, further elaborated on the principle of non-intervention holding that it "Forbids all States . . . to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State Sovereignty, to decide freely[.]. . . Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."

¹⁰² Maastricht Principles, *supra* note 4, ¶ 23.

and cultural rights.¹⁰³ These measures include administrative, legislative, investigative, adjudicatory and other measures.¹⁰⁴ Furthermore, Principle 24 provides that all other States have a duty to refrain from nullifying or impairing the discharge of this obligation.¹⁰⁵

Principle 25 prescribes the circumstances which elicit the obligation to protect extraterritorially. Under Principle 25, "States must adopt and enforce measures to protect" in circumstances where "the harm or threat of harm originates or occurs on its territory;"¹⁰⁶ where "the non-State actor has the nationality of the State concerned;"¹⁰⁷ or where "any conduct impairing . . . rights constitutes a violation of a peremptory norm of international law."¹⁰⁸ Principle 25 further elaborates that "where any conduct impairing . . . rights constitutes a crime under international law, States must exercise universal jurisdiction over those bearing a responsibility or lawfully transfer them to an appropriate jurisdiction."¹⁰⁹

These bases for protection are consistent with principles of jurisdiction found in customary international law. Under customary international law, a State may exercise jurisdiction on the bases of territoriality, nationality, and universality. The territoriality principle grants a State jurisdiction over conduct which takes place within its own borders; this is known as subjective territoriality.¹¹⁰ Under the territoriality principle, a State may also acquire jurisdiction over conduct which takes place outside of the State's borders, but which has effects within its borders; this is known as objective territoriality.¹¹¹ Under the principle of nationality, a State may have extraterritorial jurisdiction if one or more of its nationals is the victim or perpetrator of a violation.¹¹² Finally, under the principle of universality, any State may exercise jurisdiction when a situation involves exceptionally egregious violations of human rights.¹¹³ These principles are reflected in Principle 25.

Under Principle 25, States also have an obligation to protect when, "as regards business enterprises, . . . the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activity, in the State concerned[.]"¹¹⁴ This standard, as well as the territoriality-, nationality-, and universality-based standards, are consistent with current international jurisprudence which recognizes ETOs in cases where the State exercises 'effective control' or 'decisive influence' over the non-State actor.¹¹⁵ Principle 25 also articulates the 'reasonable link' standard, similar to that put forth in General Comment No. 16 of the Committee on the Rights of the Child,¹¹⁶ providing that States have an obligation to protect "where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory."¹¹⁷

¹⁰³ *Id.*, ¶ 24.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, ¶ 25(a).

¹⁰⁷ *Id.*, ¶ 25(b).

¹⁰⁸ *Id.*, ¶ 25(e).

¹⁰⁹ *Id.*, ¶ 25(e).

¹¹⁰ See SEAN MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 240-45 (1st ed. 2006).

¹¹¹ See *id.* at 242-45. For further jurisprudence regarding the applicability of the territoriality approach, see *Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

¹¹² See MURPHY, *supra* note 110, at 242-45.

¹¹³ See, e.g., *Attorney-General of Israel v. Eichmann*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962) (finding Israel's exercise of jurisdiction proper under the principle of universality, despite the fact that the State of Israel did not exist at the time of Eichmann's participation in Nazi acts of genocide).

¹¹⁴ Maastricht Principles, *supra* note 4, ¶ 25(c).

¹¹⁵ See *infra* section 0.

¹¹⁶ See CRC, General Comment No. 16, *supra* note 56, ¶ 43.

¹¹⁷ Maastricht Principles, *supra* note 4, ¶ 25(d).

Principle 26 provides that if the State is "in a position to influence the conduct of non-State actors, even if they are not in a position to regulate such conduct, such as through their public procurement system or international diplomacy, [the State] should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect economic, social, and cultural rights."¹¹⁸ This is consistent with the principles of international cooperation set out in the U.N. Charter¹¹⁹ and with repeated calls by human rights treaty bodies and Special Procedures for States to exercise their influence over non-State actors for the protection of human rights.¹²⁰

Finally, Principle 27 requires that States "cooperate to ensure that non-State actors do not impair the enjoyment of the . . . rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected."¹²¹

Implications

ETOs should be operationalized in a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

Effective operationalization of the extraterritorial obligation to protect under human rights law is critical to closing existing gaps of protection with regard to corporate accountability for human rights abuses. The articulation of ETOs in an internationally legally binding instrument on TNCs and other business enterprises with respect to human rights would also confront the structural imbalance apparent in the international legal order that privileges business interests above human rights protections.

The Maastricht Principles provide the basis for the operationalization of ETOs in an internationally legally binding instrument regarding TNCs and other business enterprises with respect to human rights.

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights comprehensively lay out the content and scope of ETOs as reflected in international human rights law. As such, the Maastricht Principles provide the legal basis for the operationalization of ETOs with respect to all human rights in an internationally legally binding instrument regarding TNCs and other business enterprises and should be looked to for guidance in this task.

Conclusion

The Open-ended Intergovernmental Working Group's elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights is a vital legislative moment in the decades-long process of achieving adequate and effective accountability mechanisms for corporations operating abroad. The codification of ETOs in such an instrument will close the protection gaps resulting from TNC violations of human rights that is endemic in the current legal order, and it will ultimately bring greater protections and remedies to affected individuals and communities throughout the world.

This paper analyzes home-States' obligations to protect human rights extraterritorially. As documented, ETOs are currently established in international human rights law, and their application to TNC and other business activities is further supported by the work of international tribunals, treaty bodies, and U.N. Special Procedures. Despite widespread

¹¹⁸ *Id.*, ¶ 26.

¹¹⁹ See U.N. Charter arts. 55, 56.

¹²⁰ See *infra*, sections 0-0.

¹²¹ Maastricht Principles, *supra* note 83, ¶ 27.

support of ETOs with respect to business and human rights, serious gaps remain as to their effective implementation. Therefore, the adoption of an international legal instrument that sets forth a binding legal framework for the implementation of ETOs can help close the gaps that lead to corporate impunity.

The Maastricht Principles provide the clarity concerning issues of definition, scope, and content of ETOs that is needed to establish concrete and workable international standards on the matter, on the basis of accepted principles and norms of international law. The Maastricht Principles thus provide a comprehensive basis for the codification of ETOs in the legally binding instrument on TNCs and other business enterprises and human rights.

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